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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 98-204
Broadcast and Cable	)	
Equal Employment Opportunity	)	
Rules and Policies	)	
and	)	MM Docket No. 96-16
Termination of the	)	
EEO Streamlining Proceeding	)	

TO: The Full Commission

JOINT PETITION BY 50 NAMED STATE BROADCASTERS ASSOCIATIONS FOR STAY OF NEW BROADCAST EEO RULES

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SUMMARY

In an unprecedented action, all of the State Broadcasters Associations (the "State Associations"), representing broadcasters in the 50 states, the District of Columbia and Puerto Rico, have joined together to serve and protect their broadcast stations by contesting the Commission's recent action establishing new EEO requirements. These new regulations recast and essentially readopt the Commisssion's former unconstitutional EEO requirements ("affirmative action" is now called "recruitment outreach"), in the form of even more onerous and suspect race and gender based equal employment opportunity regulations in contravention of the Court's holdings in Lutheran Church.

Yesterday, the State Associations filed an appeal of the Commission's new EEO regulations in the United States Court of Appeals for the District of Columbia Circuit. Today, the State Associations are filing with the Commission this joint petition for stay of the effectiveness of the new EEO regulations until the court decides their appeal. The State Associations presently intend to pursue a stay in court if the Commission does not grant a stay by March 31, 2000.

The State Associations have proceeded reluctantly due to their dedication to workplace diversity and nondiscrimination. The State Associations are committed to serving their respective stations by aiding them, in a proactive way, to expand diversity in their workplaces. The Broadcast Executive Directors Association's "Model Broadcast Careers Program Road Map" ("Model Program"), evidences the State Associations' commitment to that goal. The Model Program represents a very thoughtful, multifaceted, race and gender neutral program to encourage and enable more people of all ages, races, ethnicities and genders to enter the broadcasting field. This is accomplished by: broadening the awareness of broadcasting as an

interesting and rewarding career; ensuring that high schools and colleges share that appreciation in terms of offering relevant courses and experiences; providing scholarships and internships to those who have shown a serious interest in pursuing a career in broadcasting; using the Internet to give those truly interested in pursuing jobs in broadcasting instantaneous information on station job vacancies throughout the country; and by continuing to educate stations on their responsibilities in this area. The Commission, however, rejected this race and gender neutral "real jobs for real people" program in favor of even more burdensome regulations, covering more stations than ever before.

Consistent with their duty to protect broadcast stations, the State Associations concluded that they had no alternative but to act to safeguard their stations, in this instance, from governmental action which violates not only their rights under the United States Constitution but also their fundamental right to lawfully carry on their businesses without the constant threat of extortion and greenmail by those who would seek to use the Commission's processes to further their own ends. In the view of the State Associations, the Commission has allowed its rulemaking process to be manipulated by third parties who, based on past conduct, will use the new overbroad and vague rules to pressure stations to hire on the basis of race and gender or risk retaliation in the form of petitions and complaints alleging "discrimination" and "misrepresentation" filed with the Commission with the purpose of delaying action on important applications, of causing the Commission to launch debilitating audits and investigations and of urging the Commission, under a policy of "zero tolerance," to impose catastrophic fines and take away valuable licenses. In short, the Commission has in effect painted a bull's-eye on the back of virtually every broadcaster and encouraged, and indeed enabled, third parties to come forward

and take as many shots as they like. The only real "flexibility" granted under the new EEO regulations is awarded to third parties and none to broadcasters. All this is wrong as a matter of both law and policy. No broadcaster should be subjected to an ordeal similar to what The Lutheran Church-Missouri Synod was forced to go through. Under the new EEO regulations, the experience of the Lutheran Church-Missouri Synod is calculated to be repeated hundreds of times over.

The Joint Petition demonstrates why the Commission's new EEO regulations violate the United States Constitution and are arbitrary and capricious and otherwise contrary to law. The Joint Petition also explains, in a compelling way, why a stay of the effectiveness of the new EEO regulations pending court review is necessary and appropriate.

Specifically, the Joint Petition shows that the new EEO regulations will cause irreparable injury to broadcast stations and to the persons they consider for employment. In purpose and reasonable effect, the new EEO regulations will require the use of race and gender in making station employment decisions, such as who to recruit and interview. The new EEO regulations are also designed to legally mask, but operationally create, impermissible pressure on stations to make hiring decisions based on race and gender. In sum, the new EEO regulations are a race and gender-based employment program which violate the equal protection component of the Fifth Amendment. Under the regulations, broadcasters will be required to expend substantial efforts and incur substantial costs in implementing the new burdensome regulations, and run the risk of discrimination suits by those who perceive that they were not selected by broadcast regulatees because they were not of the race or gender favored by the Commission under the new EEO regulations. The reputational damage and other costs to stations and the broadcast industry

participating in a race and gender based employment program, and to the Commission's efforts in this area, will be irreparable.

The Joint Petition also demonstrates why the State Associations, on behalf of their members, are likely to prevail on the merits. The new EEO regulations invoke "strict scrutiny," a standard which those regulations cannot survive even if they can be said to be Congressionally authorized. The Commission does not dispute the principle that any new EEO regulations are circumscribed by the requirements of the United States Constitution. Constitutional law holds that where governmental regulations categorize persons by race or gender, those regulations must withstand the strict scrutiny of the court and the government must show that such regulations are narrowly tailored to achieve a compelling governmental interest.

In the Joint Petition, the State Associations cite to the Lutheran Church court's holdings that the Commission's end goal, "diverse programming," is too abstract to be meaningful and that the goal is not a compelling governmental interest. In those two respects, the Commission has not demonstrated otherwise in its EEO decision. The Joint Petition also illustrates the failure of the Commission to "narrowly tailor" its new EEO measures to its stated governmental interest.

Furthermore, the State Associations demonstrate why "deterring discrimination" is not a legally supportable rationale for the new EEO recruitment outreach requirements. Specifically, the Joint Petition shows that the new EEO outreach regulations are not intended to remedy any past or future unlawful discrimination; success in recruiting minorities and women does not in and of itself deter intentional unlawful discrimination, only the prohibition against unlawful discrimination does; and the Lutheran Church court has already rejected the notion that outreach rules are needed to seek nondiscriminatory treatment of women and minorities.

The Joint Petition also contains numerous examples of why the Commission's EEO Report and Order is arbitrary and capricious.

In terms of addressing the remaining elements for a stay, the State Associations show that no irreparable injury will be caused to others if a stay is granted. Federal, state and local discrimination laws will not be jeopardized by the grant of a stay. In addition, the Commission did not conduct a survey of, find, or even claim that the level of outreach effort that currently exists within the industry is inadequate to achieve "diverse programming."

The Joint Petition concludes by explaining why the public interest favors a stay. As the State Broadcasters Associations point out, the public interest is disserved anytime the Federal government takes action which violates the United States Constitution. It clearly serves the public interest for that same government to be cautious, to take steps that protect the Constitution and the rights of its citizens thereunder during judicial review. Moreover, a stay will allow the court an appropriate opportunity to assess whether the Commission has adequately addressed the court's concerns under Lutheran Church without the Commission placing the broadcast industry and the people they recruit at risk of having their constitutional rights violated during the interim. Lastly, a stay is necessary to avoid the likelihood of serious confusion within the broadcast industry and the nation while the Commission considers the Petition for Reconsideration filed by the NAB, as well as any others filed, particularly since the speed with which the Commission acts on the petition and the outcome of such action are unknown and under the Commission's exclusive control.

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TO: The Full Commission

JOINT PETITION BY 50 NAMED STATE BROADCASTERS ASSOCIATIONS FOR STAY OF NEW BROADCAST EEO RULES

The Maryland-District of Columbia-Delaware Broadcasters Association, Inc., Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota

Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, New York State Broadcasters Association, Inc., North Carolina Association of Broadcasters, North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Radio Broadcasters Association of Puerto Rico, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (collectively, the "State Associations"), by their attorneys, and pursuant to Sections 1.41, 1.44(e) and 1.103(a) of the Commission's Rules and Regulations, hereby jointly petition the Commission for the issuance of a stay of the effectiveness of the Commission's new broadcast equal employment opportunity regulations (the "New EEO Regulations") adopted in its Report and Order in MM Docket Nos. 98-204 and 96-16 (this "Petition"). See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, MM Docket Nos. 96-16, 98-204, Report and Order, FCC 00-20 (released February 2, 2000) [hereinafter "EEO R&O"].

I. INTRODUCTION

A. Procedural Posture of the Matter

The New EEO Regulations are scheduled to become effective on April 17, 2000, by virtue of the fact that those regulations were published in the Federal Register on February 15, 2000. See 65 Fed. Reg. 7448 (February 15, 2000). The New EEO Regulations have an affirmative action (now characterized by the Commission as a "recruitment outreach") prong and a nondiscrimination prong. These regulations were promulgated in response to an order of reversal and remand from the United States Court of Appeals in the District of Columbia Circuit in Lutheran Church - Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998), pet. for reh'g denied, 154 F.3d 487, pet. for reh'g en banc denied, 154 F.3d 494 (D.C. Cir. 1998) [hereinafter "Lutheran Church"]. Specifically, the Court in Lutheran Church held unconstitutional the affirmative action prong of the Commission's former broadcast equal employment opportunity regulations and questioned the authority of the Commission to promulgate a nondiscrimination prong. Lutheran Church at 356. Unlike the affirmative action prong, the Court did not invalidate the nondiscrimination prong of the former EEO regulations. See 47 C.F.R. § 73.2080(a) (1999). That prong remains in force pending the Commission's explication of its authority and until any new superseding regulations take effect.

The Office of Communication, Inc., United Church of Christ, (the "UCC") filed a Petition for Review of the EEO R&O in the United States Court of Appeals for the Second Circuit (the "Second Circuit"). See Office of Communication, Inc., United Church of Christ v. F.C.C. (Case No. 00-4040), filed February 24, 2000. The UCC, historically a supporter of the

Commission's EEO regulations, did not give any indication why it is aggrieved by the EEO R&O.

The State Associations have filed a Petition for Review of the EEO R&O in the United States Court of Appeals for the District of Columbia Circuit ("District of Columbia Circuit") on the ground that the EEO R&O violates the Fifth Amendment of the Constitution of the United States and is arbitrary, capricious, and otherwise contrary to law. See Maryland-District of Columbia-Delaware Broadcasters Association, Inc. et al. v. F.C.C. (Case No. 00-1094), filed March 15, 2000. If necessary, the State Associations intend to file a motion in the Second Circuit seeking the transfer of these appeals to the District of Columbia Circuit. The State Associations would not oppose a request for an expedited briefing schedule in order to minimize any delay.

The National Association of Broadcasters ("NAB") is, this date, filing a Petition for Reconsideration ("Reconsideration Petition") of the EEO R&O, urging the Commission to make a significant number of changes to its new EEO recruiting, reporting and recordkeeping requirements and to its related enforcement policies.

The stay requested herein would remain in effect until such time as the Commission acts on all such petitions for reconsideration and the judicial appeals of the New EEO Regulations have been resolved. In the alternative, at a minimum a stay should be granted and remain in effect until the court has ruled on a motion for stay which will promptly be filed in court by the State Associations. Because of the April 17, 2000 effective date of the New EEO Regulations, the State Associations presently intend to file a stay motion with the court if the Commission does not grant a stay by March 31, 2000.

B. Interest of Petitioners

Each of the State Associations participated in one or both of the proceedings below. The State Associations are trade associations in the 50 states, the District of Columbia and Puerto Rico. They represent the interests of their members, most of whom are broadcast station licensees and permittees regulated by the Commission in their respective geographical areas. The State Associations fully share the Commission's goals of non-discrimination, workplace diversity and programming that serves the interests of all members of broadcasters' communities. Moreover, just as the Commission, the Associations believe that there should not be "sole reliance on word-of-mouth recruiting" and that any new EEO regulations be fully consistent with the Fifth Amendment of the United States Constitution.

The State Associations previously urged the Commission to help the broadcast industry find ways to facilitate successful job searches by both station employers and prospective employees, regardless of gender, race or ethnicity, and not to impose bureaucratic paper processes that only serve to take away from the key objective of "finding real jobs for real people." As a constructive approach, the State Associations worked on behalf of their station members, and through the Broadcast Executive Directors Association ("BEDA"), to develop the "Model Broadcast Careers Program Road Map" which is "a race- and gender-neutral outreach plan that would present no Equal Protection problem." (EEO R&O, Dissent of Commissioner Harold W. Furchtgott-Roth at 17). The Commission declined to accept the program, thereby adversely affecting the interests of the State Associations and their members.

The program adopted by the Commission instead will adversely affect member broadcast stations. First, "[i]t is undeniable . . . that [any station will be] harmed by [any] Commission . . .

order finding it in violation of the EEO regulations. [Such] . . . order is a black mark on . . . [any station's] . . . licensing record and could affect its chances of license renewal down the road." Meredith Corp. v. FCC, 809 F.2d 863, 868-69 (D.C. Cir. 1987). Lutheran Church at 349. Second, independent of any adverse order, the New EEO Regulations will cause broadcast stations "economic harm by increasing the expense of maintaining a license. Every broadcast station must develop a fairly elaborate EEO program and document its compliance . . . It involves paperwork, monitoring, and spending more money on advertisements. And if the rules do force a station to discriminate, they expose it to risk of liability under 42 U.S.C. 1983 (1994) . . . Indeed forced discrimination may itself be an injury." Lutheran Church at 349-350. Accordingly, the State Associations have the requisite interest to file and prosecute this Petition.

II. ARGUMENT

In determining whether a stay is warranted, the Courts, and the Commission, consider: (i) whether the petitioner will suffer irreparable harm if a stay is not granted; (ii) whether the petitioner is likely to prevail on the merits; (iii) whether other interested parties would be substantially harmed if the stay is granted; and (iv) whether the public interest favors the grant of a stay. See, e.g., Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) [hereinafter "WMATA"]; Larouche v. Kezer, 20 F.3d 68, 72 (2d Cir. 1994) [hereinafter "Larouche"]; In the Matter of Biennial Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, WT Docket Nos. 98-20, 96-188, RM-8677, Memorandum Opinion and Order, FCC 99-129 [16 CR 270] (released June 9, 1999) at para. 4 (citing Virginia Petroleum Jobbers Ass'n v.

FPC, 259 F.2d 921, 925 (D.C. Cir. 1958)). The test is a flexible one -- a stay may issue if the arguments for one factor are particularly strong, even if the arguments in other areas are not as strong. Cityfed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995).

Under this standard, to show that a stay of the New EEO Regulations should be granted, the State Associations need not establish that they have a certainty of success on the merits of their appeal. Population Institute v. McPherson, 797 F.2d 1062, 1078 (D.C.Cir. 1986); see also Larouche at 72 ("The grant does not depend solely or even primarily on a consideration of the merits.") Rather, "it will ordinarily be enough that the [petitioner] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." WMATA at 844, quoting Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953) (Frank, J.) [hereinafter "Hamilton Watch"].

Under this standard for stay, there is no serious doubt that the State Associations, on behalf of their broadcast station members, are entitled to a stay pending appeal of the EEO R&O. At the outset, it should be noted that there is a consideration unique to this case which weighs heavily in favor of a stay. The issues dealt with in the EEO R&O are on remand under Lutheran Church issued by the District of Columbia Circuit where the State Associations have now appealed. The New EEO Regulations are expressly intended to address the court's concerns (EEO R&O at paras. 5 and 229). The State Associations, with substantial support in fact and law, submit that the Commission has not acted in a manner consistent with the holdings of the Court in Lutheran Church. Out of deference to the same court, the Commission should, in the

public interest allow the court to be the arbiter of this matter without risking government action in violation of the United States Constitution. Indeed, at the request of the Lutheran Church-Missouri Synod, the court previously granted a stay of the Annual Employment Report filing requirement under the Commission's former EEO regulations. See Order of the Court in Lutheran Church (D.C. Cir. November 13, 1997.) The Annual Employment Report filing requirements contained in the New EEO Regulations are identical to those under the former EEO rules.

A. THE NEW EEO REGULATIONS WILL CAUSE IRREPARABLE INJURY TO BROADCAST STATIONS AND TO THE PERSONS THEY CONSIDER FOR EMPLOYMENT

Just as under the old rules, the Commission's New EEO Regulations will in effect force broadcast stations "to engage in the most historically odious sort of discrimination against potential employees -- discrimination based on race -- . . . a most grievous offense." (Dissenting Opinion of Commissioner Harold W. Furchtgott-Roth at 10). As the court in Lutheran Church stated: ". . . if the rules do force a station to discriminate, they expose it to risk of liability under 42 U.S.C. 1983 (1994)." Lutheran Church at 350.

Measured in terms of their stated purpose and reasonable effect, the New EEO Regulations are unconstitutional for essentially the same reasons that the court struck down the former affirmative action regulations in Lutheran Church. As shown below, not only do the New EEO Regulations require use of race and gender in making employment decisions, such as who to recruit and interview, they are designed to legally mask, but operationally create, impermissible pressure on broadcast stations to make hiring decisions based on race and gender.

In short, the New EEO Regulations are a race and gender-based employment program in violation of the equal protection component of the Fifth Amendment.

The Commission's New EEO Regulations, if not stayed, will cause irreparable injury to the equal protection rights of broadcast stations as well as to the equal protection rights of any person seeking employment who may be discriminated against by a broadcast station acting as an "involuntary participant" in the Commission's race and gender-based employment scheme. Lutheran Church at 350. In the absence of a stay, the New EEO Regulations will require broadcasters to expend substantial efforts and incur substantial costs in implementing the new regulations, as well as run the risk of discrimination suits by those who perceive that they were not selected by broadcast regulatees because they were not of the race or gender favored by the Commission under its New EEO Regulations. The reputational damage and other costs to stations and the broadcast industry participating in the grievous offense of discrimination based on race and gender, and to the Commission's efforts in this area, will be irreparable. While the "Fifth Amendment . . . does not contain an equal protection clause . . . the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

B. THE STATE ASSOCIATIONS ARE LIKELY TO PREVAIL ON THE MERITS

For the following reasons, the State Associations are likely to prevail in their claims. At the very minimum, the State Associations certainly "raise questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." WMATA at 844 (quoting Hamilton Watch).

1. The New EEO Regulations Violate the Equal Protection Component of the Fifth Amendment

The State Associations submit that under Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) [hereinafter "Adarand"] and Lutheran Church, the Commission's New EEO Regulations invoke strict scrutiny, a standard which those regulations cannot survive. Even assuming arguendo that the Commission has the statutory authority to adopt the New EEO Regulations, that authority, and any regulations promulgated thereunder, are circumscribed by the requirements of the United States Constitution.[1] Where governmental regulations categorize persons by race or gender, those regulations must withstand the "strict scrutiny" of the court and the government must show that such regulations are narrowly tailored to achieve a compelling governmental interest. Adarand at 2113. The State Associations submit that the Commission has woefully failed this test. The FCC has not shown that the current level of dissemination of job information by the broadcast industry is inadequate. Therefore, the only reason for its recruitment outreach regulations is to pressure stations into engaging in race and gender-based hiring. Such regulations invoke "strict scrutiny" and are not narrowly tailored to achieve a compelling governmental interest.

a. The New EEO Regulations Require Stations to Make Employment Decisions Based on Race and Gender

The New EEO Regulations require stations to use race and gender in making decisions

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[1]The Commission does not dispute this principle. For example, the Commission has stated that it is only obligated to implement Congressionally mandated cable EEO regulations "'to the extent possible,' consistent with other conflicting requirements or limitations. The Court's decision in Lutheran Church delineates constitutional limitations with which we must reconcile the cable EEO rules" (EEO R&O at para. 19).

about whom to recruit for employment at their stations. This is plain on the face of Option B, under which stations are required to maintain detailed records on the number of female and minority applicants for each full-time vacancy (EEO R&O at paras. 78 and 104). This information must also be contained in the station's "EEO Public File Report" and placed annually in the station's public inspection file (and on the station's website if it has one) for the world to see. Id. at paras. 78 and 124. While the requirement to use race and gender under Option A may not be as explicit in the rules, it takes no elaborate analysis to show that the requirement exists here as well. The Commission has stated that the tracking of race, ethnicity and gender required under Option B is necessary to enable each station to monitor whether its outreach efforts are "inclusive." Id. at paras. 104 and 124. The plain purpose of the tracking requirement is to give the station the data necessary so that it can determine whether there are "enough" minorities and women being referred for each applicant pool.

The objective of "inclusiveness" is the same under Option A. Id. at para. 85. The Commission states: "Regardless of the chosen approach, we expect a broadcaster to utilize the relevant data concerning its recruitment efforts as part of ongoing efforts to analyze the productivity of its recruitment efforts in achieving broad outreach to all segments of the community, including minorities and women, and to determine whether any modifications in its EEO efforts or recruitment sources are warranted" (EEO R&O at para. 114) (emphasis supplied). The word "productivity" is not defined, but the State Associations do not understand how this self-assessment could be construed to mean anything other than that each station must evaluate

the results in recruiting minorities and women.[2] That is one clear purpose of the New EEO Regulations. The other purpose, hiring, is discussed infra.

The Court in Lutheran Church left open the question whether requirements, such as these, that stations recruit on the basis of race, themselves violate the Fifth Amendment. Lutheran Church at 351. The Court noted, however, that even if such requirements on decisions in the employment process "had no real or immediate effect on employment," they would appear to violate the Fifth Amendment because "the Equal Protection Clause would not seem to admit a de minimis exception." Id. To see why this is so, one need only imagine a case where a local government -- especially one that was acting in response to a ruling that its former rules violated the Fifth Amendment by imposing race-based classifications without adequate justification -- formulated new rules that required its agencies to track how many Caucasians it recruited for employment and to make sure that recruitment efforts were "productive" in recruiting Caucasian people. Is there any doubt that this scenario would raise grave concerns under the Fifth Amendment? And under the race-neutral principles of Adarand, the State Associations do not understand how this can be distinguished from the New EEO Regulations. The FCC's requirement that broadcasters distinguish among people in recruitment efforts on the basis of their race and gender violates the "central mandate" of the Equal Protection Clause, "racial neutrality in governmental decisionmaking." Miller v. Johnson, 515 U.S. 900, 904 (1995).

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[2]The Commission's contention that Option B is "completely optional" is disingenuous and of no consequence (EEO R&O at para. 224). Small market stations will have no real option except to use Option B. In any event, the Commission is estopped from making this claim since the Commission itself is importuning broadcast stations, particularly those in smaller markets, to elect Option B as "a less burdensome method . . ." Id. at para. 126 In any case, as shown above, Option A also requires recruitment decisions based on race and gender.

"Distinctions between citizens based solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Rice v. Cayetano, 2000 U.S. LEXIS 1538 at p. 39 (February 23, 2000), quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943) [hereinafter "Rice"]. "Laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieving a compelling state interest." Miller v. Johnson, 515 U.S. at 904. At a minimum, the constitutionality of the New EEO Regulations is a serious question for deliberative investigation by the court, and a stay is therefore warranted. See Hamilton Watch at 740.

b. The New EEO Regulations Also Pressure Stations to Grant Race and Gender Preferences in Hiring Decisions

The Court in Lutheran Church held that the Commission's former EEO regulations impermissibly pressured broadcast stations to hire employees based on race. Lutheran Church at 354. The State Associations submit that the New EEO Regulations also "extend beyond outreach efforts and certainly influence ultimate hiring decisions" as well as "oblige stations to grant some degree of preference to minorities [and women] in hiring." Lutheran Church at 351.

Notwithstanding any changes the Commission has made to its EEO regulations, these New EEO Regulations retain the same over-arching purpose and reasonable effect, namely, the employment of persons by racial and gender classification. In adopting its New EEO Regulations, the Commission has expressed the desire to eliminate "homogenous" station workforces and staffs where "minorities and women are poorly represented" (EEO R&O at paras. 3 and 40). The Commission gives two justifications for its goals: one, "if the group of people who make programming decisions at a broadcast station . . . come from a wider variety of

backgrounds with a greater range of human experience and social interactions, their programming decisions will better reflect the diversity of viewpoints in our pluralistic society than would programming decisions made by a homogenous workforce" (EEO R&O at para. 4)[3]; and, two, ". . . employment in the broadcasting industry provides minorities and women with the skills needed to acquire and operate a broadcast station and may help them in becoming aware of ownership opportunities. Such employment may also facilitate their acquisition of capital needed to purchase a broadcast station, as financing sources are generally more willing to work with borrowers that have a track record in the business they seek to own and operate" (EEO R&O at para. 43).

The terms "homogenous" and "poorly represented" are, at bottom, numerical "underrepresentation" measurements, each connoting the lack of a sufficient number of minorities and women employed at a station. No matter how the Commission attempts to mask its purpose and means, the conscious focus of stations under the New EEO Regulations must be on the number of minorities and women recruited, interviewed and hired. Simply stated, the interplay between the Commission's new EEO recruitment, recordkeeping and reporting requirements and its enforcement policies creates this dynamic: If a station knows (as it is required to do) how few, if any, minorities and women are applying, the station knows that it needs to do more to recruit such persons because of their race and gender. If a station knows (as it is required to do) that an adequate number of minorities and women are applying but are not represented on staff in adequate numbers, the station knows that it needs to hire more such

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[3]The subsidiary goal of building "bridges across racial, ethnic and socioeconomic divides," while laudable, is not directly related to federal communications policy. Id.

persons because of their race and gender. Only by acting in this intended way can a station be viewed as helping the Commission to achieve its stated racial and gender representation goals.

Clearly demonstrating this ultimate hiring purpose and effect, the Commission requires all nonexempt stations (stations with five or more full-time employees) to publicly file, on a station attributed basis, Annual Employment Reports showing how many minorities and women are on staff, and in what categories of positions, as of the same two-week payroll period each year. Id. at paras. 164-165. The Commission has claimed that the sole purpose of the report is to enable it to monitor national industry trends and to report to Congress (EEO R&O at paras. 164 and 225). The Commission has also attempted to assure broadcast stations (EEO R&O at paras. 6, 64, 225 and 226), that it will not use such data to screen "renewal applications" or determine whether a station is in compliance with its new regulations and that it will not allow a third party to rely upon that publicly available data to file a "petition" against a station. However, the Commission has not precluded itself from relying upon "complaints" from third parties, which use the same data, to trigger a station audit or investigation. Nor has the Commission foreclosed itself from using the data, throughout the license term, to decide, for example, whether to audit a station or to conduct its own investigation. "No rational firm -- particularly one holding a government-issued license -- welcomes a government audit." Lutheran Church at 353.

The fact that the Commission rejected, without comment, the obvious alternative of using a tear-off sheet system to remove the identity of the filer, once the fact of the filing was established, clearly shows that the publicly available, station attributed, Annual Employment Reports are a "serious matter" (Lutheran Church at 353), and that the Commission is concerned,

and wants the public at large to be concerned, about each station's minority and female hiring "numbers," not just national hiring trends. "The risk lies not only in attracting the Commission's attention, but also that of third parties." Lutheran Church at 353.

Notwithstanding the fact that the Commission has not found or claimed, nor could it claim, that the broadcast industry is guilty of employment discrimination, the Commission has essentially painted a bull's-eye on the back of virtually every broadcaster. The Commission has vastly expanded the reach of its EEO Regulations by eliminating a decades-old policy that eliminated the requirement for a written EEO program targeted to minorities if minorities in the area labor force were less than 5% in the aggregate (EEO R&O at para.131). The Commission now requires stations to certify, four times during the license term, as to their compliance with the new outreach requirements, thereby placing every broadcaster at risk of being charged with repeated "misrepresentations," which could adversely affect a broadcaster's fitness to remain a licensee, if a third party or the FCC disagrees with the adequacy of a station's outreach efforts (EEO R&O at para. 146). The Commission has also decided to equate violations of its new recruitment outreach requirements with "character disqualifying" charges of unlawful discrimination (EEO R&O at paras. 3 and 146). The Commission caps off its effort to "criminalize" shortcomings under its new EEO program by declaring "zero tolerance" for "homogenous" station workforces and staffs where "minorities and women are poorly represented" (EEO R&O at paras. 3, 4, 145 and 146).

The pressure to hire based on race and gender may even be increased, if that is possible. The Commission has warned that it "will not hesitate to propose changes to [the] EEO rules if industry trends suggest that [they] are not effective" (EEO R&O at para. 164). While the

Commission does not state what "trends" it means, the State Associations do not see how the term, in the context of the Commission's stated diversity goal, could mean anything but the hiring of minorities and women. (Will the conduct of one or two stations constitute an "industry trend"?) Moreover, the Commission has taken the unusual step -- to say the least -- of leaving the docket in this proceeding open to allow it to "facilitate the submission of information relevant to employment disparities" (FCC Press Release on EEO Regulations (January 20, 2000)). At best, the Commission's "assurance" is only transitory.

Given this clear Commission message of intimidation, it is reasonable for every broadcaster to conclude that the only real way to avoid being selected for audit or investigation by the Commission, or for complaint by a third party, is at least to show "enough" minorities and women in each applicant pool and in each interview pool, as well as on staff and in the upper level positions as shown in each of its Annual Employment Reports. The fact that there is no publicly acknowledged "safe harbor" under these new regulations actually serves to increase, rather than reduce or eliminate, the pressure on broadcasters to give a hiring preference based on race and gender.

The pressure to hire based on race and gender will be intense and continuous, extending over each station's eight year license term. The Commission has announced that complaints alleging EEO related violations can be filed throughout the license term and that it will conduct mid-term reviews as well as hundreds of random audits of stations each year, including on-site investigations (EEO R&O at paras. 140, 145 and 147). As mentioned, the Commission has not ruled out consideration of third party complaints based on Annual Employment Report data. Accordingly, given past practices at the FCC every broadcaster can now reasonably expect third

parties to file complaints containing highly charged allegations of "unlawful discrimination" and "misrepresentation," and the FCC to commence "anti-discrimination/misrepresentation" investigations and hearings (like the one in Lutheran Church), anytime the station's annual EEO Public File Reports do not show "enough" minorities or women among its applicant pools, or anytime the station's Annual Employment Reports do not show "enough" minorities or women employed overall and in high enough positions, or anytime a third party or the Commission disagrees with the adequacy of a station's outreach efforts notwithstanding the station's certification of compliance. Under its former EEO regulations, the Commission did not equate an insufficient number of minority and female employees with a lack of basic character qualifications. Under its New EEO Regulations, the Commission has signaled that it fully intends to equate the two now. No one could seriously argue that this is not pressure to hire based on race and gender!

The Commission's contentions that the New EEO Regulations do not pressure stations to hire based on race or gender are unavailing. The State Associations have already disposed of the Commission's claim that since it will not use the reports for screening renewal applications or for assessing compliance with its EEO requirements, there is no "impermissible pressure" on stations to use racial or gender preferences in hiring. See pp. 14-15, supra. As shown, the Commission has not disclaimed the use of employment numbers in deciding whether to conduct an audit or investigation. Moreover, the Commission has a track record of considering any and all kinds of petitions, informal objections and complaints alleging EEO violations, and in particular unlawful discrimination and misrepresentation, no matter how baseless. See, e.g., Lutheran Church. In any event, it is axiomatic that the Commission cannot bind itself to refuse to consider evidence

that is relevant and material to an applicant's qualifications under the Communications Act of 1934, as amended. 47 U.S.C. § 151 et seq (1997) (the "Communications Act").

The Commission has also expressly disclaimed any intention that a station prefer a prospective employee, or promote a person, based on that person's race, ethnicity or gender (EEO R&O at paras. 130 and 210). However, that disclaimer rings hollow and is contradicted by the Commission's stated EEO regulatory purpose, the series of FCC-imposed station performance tasks and the clear risks to stations created under its New EEO Regulations. For example, the Commission denies being able to pressure stations to prefer applicants on the basis of race or gender because (a) it "will not even know the race, ethnicity or gender of the persons hired from the applicant pools" and (b) the granting of a preference based on race or gender "will not improve the employer's posture under" its New EEO Regulations or make the station's "EEO practices less likely to be scrutinized by the agency" (EEO R&O at para. 221). The first explanation is simply incorrect insofar as the race, ethnicity and gender of all persons hired is required to be submitted annually with the Commission as part of Form 395-B. See EEO R&O at para. 165. In any event, the Commission does not need to know the race or gender of each person in a particular applicant pool or of each person hired from each applicant pool for a station to realistically feel pressure to ensure that there are enough minorities and females in each applicant pool and that it is hiring enough minorities and women. Given the Commission's stated goals, it is the station's own required knowledge of such data, coupled with the threat of a complaint and/or random audit or investigation, that constitutes the heavy pressure to recruit and hire based on race and gender. Concerning the Commission's second explanation, it is simply not credible for the Commission to say that having enough minorities and women on a station's

staff will not reduce the risk of an audit or investigation or the risk of a third party complaint that may trigger an audit or investigation. Why otherwise would the Commission place in the public domain for attribution each station's Annual Employment Reports?

Lastly, the Commission's decision to eliminate the former "parity goal" processing guidelines from the New EEO Regulations does not save those regulations under the equal protection component of the Fifth Amendment.[4] The Commission states that there is no pressure to hire employees based on race because stations would not gain any "procedural advantage by bringing their levels of women and minority employees up to certain levels" (EEO R&O at para. 211). In explanation, the Commission states that it will not use comparative racial composition

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[4]Moreover, the Commission cannot simply defer the adoption of processing guidelines or "flags" for audit or investigation in order to avoid judicial scrutiny. If the Commission intends to enforce its new regulations, it must give its regulatees enough specificity so that they can make informed judgements as to what is compliant and what is not. Satellite Broadcasting Co. Inc. v. F.C.C., 824 F.2d 1, 3 (D.C. Cir. 1987) ("Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating (continued...) a rule without first providing adequate notice of the substance of the rule.") (citing Gates & Fox Co., Inc. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986) ("Where the imposition of penal sanctions is at issue ... the due process clause prevents that deference [to an agency's interpretation of its regulations] from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.")). When will a station's outreach efforts be considered to be legally "broad" enough and "inclusive" enough? When will a station be deemed, as a legal matter, to have recruited, interviewed and hired "enough" minorities and women to avoid a claim of "underrepresentation?" The Commission does not say.

The Commission has not even determined what will be the base amount for a violation of its New EEO Regulations or what factors will result in an upward or downward adjustment of that amount. In contrast, when considering new EEO rules in 1996, the Commission concluded that EEO forfeiture guidelines were necessary to "provide broadcasters with a greater degree of predictability and certainty with respect to sanctions that may be imposed for violations of our EEO requirements" and to "facilitate a resolution of EEO cases." In the Matter of Streamlining Broadcast EEO Rules and Policies, MM Docket No. 96-16, Order and Notice of Proposed Rule Making, 11 FCC Rcd 5154, 5155 (released February 16, 1996) ("Streamlining"). In short, the Commission has not even legally completed this rule making.

"processing guidelines" in processing renewal applications. Id. at para. 221, fn. 336. As further support, the Commission cites with approval MMTC's argument that "there is no possible regulatory benefit or detriment available to a broadcaster by hiring or not hiring minorities or women" Id. at para. 211, fn.337. These positions are specious. The reduced or increased threat of a third party complaint or an FCC audit or investigation is a clear "regulatory benefit or detriment," and that risk, because of the public availability of Annual Employment Report data, for example, surely turns on whether the broadcaster hires or does not hire "enough" minorities and women! As the Lutheran Church court stated: "No rational firm -- particularly one holding a government-issued license -- welcomes a government audit." Lutheran Church at 353. "The risk lies not only in attracting the Commission's attention, but also that of third parties. 'Underrepresentation' is often the impetus . . . for the filing of a petition to deny, which in turn triggers intense EEO review." Id.

In the end, the self-assessment required of stations under the New EEO Regulations is fundamentally a numerical "underrepresentation" analysis. It strains credulity to believe that a station's hiring "numbers" are of no importance or are of lesser importance than its recruiting "numbers" since only by each station hiring enough minorities and women will the Commission have achieved its stated "diverse programming" goals. What the broadcaster is left with under the new regulations is substantial uncertainty as to what it must do, short of recruiting, interviewing and hiring enough minorities and women, to avoid an audit, an investigation, a petition, a complaint, a hearing, a forfeiture or loss of license. The lack of standards to measure full compliance, coupled with the continuous oversight and the potentially devastating costs of audits, investigations and hearings, on their face, constitute long-term, intense, extraordinary

pressure to recruit and hire based on race and gender. Putting aside the Commission's "wordsmithing" ("recruitment outreach" instead of "affirmative action;" and, reliance on 395-B report data is out-of-bounds if contained in a "petition," but not if contained in a "complaint"), the EEO R&O points to very intense Commission scrutiny in this area, with potentially draconian results for even the most well meaning broadcasters.

c. "Diverse Programming" is not a Compelling Governmental Interest

Under its EEO R&O, the Commission has retained and expanded upon its "programming diversity" rationale as one of the now twin underpinnings for its new EEO regulations (EEO R&O at paras. 3 and 4). However, the concept of "diverse programming" remains vague to say the least. Before the Court in Lutheran Church, the Commission offered that the "compelling" governmental interest for its EEO regulations was "diverse programming," a concept the Court found "too abstract to be meaningful." Lutheran Church at 354. The Commission provides no clearer definition of "diverse programming" than it did in Lutheran Church. Moreover, the Commission's concept rests on unproven program service deficiencies and unacceptable stereotypes. In any event, the concept does not relate to lower level employees who have no input into programming decisions.

The Commission states at different places that it is attempting to have stations air "different points of view" (EEO R&O at para. 49), "varying perspectives" (Id.), "a diversity of views" (Id. at paras. 50 and 53) and "diverse programs" (Id. at para. 55). There is no finding that stations are not being responsive to the needs and interests of their diverse communities of license (Id. at para. 4), or that stations are not presenting "varying perspectives," "a diversity of views" or "diverse programs." Moreover, there is no finding that stations are not providing

sufficient "programming that reflects the diverse views and interests present in our society." Id. at para. 4. How rationally can the Commission conclude that it must practice intervention to promote the airing of "diverse programming," whatever that means, when it has not determined either what the current level of minority and female "representation" is in the broadcast industry or that more "diverse programming" is needed and cannot be expected to continue to increase on its own?

Even if its regulatory goal were supported by the record, the Commission's regulatory means to that end is fallacious because it rests on the unacceptable stereotype that certain employees and certain owners, because of their race and gender, are more likely to be the source of additional "diverse programming" than an employee or owner not of the same race or gender. First, the Commission's conclusion is contradicted by its own opening concession. In stating that "we harbor no illusion that members of any group share the same outlook or views" (EEO R&O at para. 4), the Commission effectively admits that no single person, regardless of race or gender, necessarily holds the same viewpoint and that each person has his or her own unique viewpoint on a myriad of issues. Second, the courts have expressed concern with the use of racial and gender stereotypes to support government action. The Lutheran Church court expressed doubt that "the Constitution permits the government to take account of racially based differences, much less encourage them" and opined that "[o]ne might well think such an approach antithetical to our democracy," citing J.E.B. v. Alabama, 511 U.S. 127, 140 (1994) ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes . . ."); Rice at 39, quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people where institutions

are founded upon the doctrine of equality."); Lamprecht v. F.C.C., 958 F.2d 382, 342 (D.C. Cir. 1992) ("[T]he Supreme Court has repeatedly denounced 'unsupported generalizations about the relative interests and perspectives of men and women,'" citing numerous Supreme Court cases.)

As for the Commission's expanded "diverse programming" rationale, which is intended to place even the lowest level employees within the ambit of the New EEO Regulations, that rationale is based on a chain with too many attenuated and unproved links and no end: stations owned by minorities and females are supposedly more likely to be responsive to the needs and interests of all segments of the community served; to become an owner, a person needs work experience to develop the relevant skills and a track record in the business to obtain the necessary capital to acquire a station; to develop such experience, skills and credibility, a person needs to have access to information about job openings at stations in order to compete for a particular job (EEO R&O at para. 43); a person with such information will surely get a job in broadcasting; such person will likely remain in the industry long enough to gain the needed credibility; etc. However, even if ownership were substituted for employment as the real engine of "diverse programming," this governmental interest remains suspect for the same reasons stated above.

In any event, any governmental interest in "diverse programming" has not been shown to be "compelling." Assuming arguendo that the Commission's reliance on various legislative actions of Congress may demonstrate that the government's interest in "diverse programming" is "important," it is far from clear that "diverse programming" is a "compelling" governmental interest. If "diverse programming" is the governmental goal, it is by no means an overarching goal that one would equate with a "compelling" interest of the government. The court in Lutheran Church concluded that such interest was not compelling, holding that "after carefully

analyzing Metro Broadcasting's opinions [497 U.S. 547 (1990)] and considering the impact of Adarand, it is impossible to conclude that the government's interest, no matter how articulated, is a compelling one." Lutheran Church at 355.

d. The New EEO Regulations are not Narrowly Tailored

The Commission-imposed classifications by race and gender, to be constitutional, must be "narrowly tailored measures" that further a compelling governmental interest. Adarand at 2113. The New EEO Regulations are not narrowly tailored. For example, if the Commission's true purpose under those regulations were simply to give potential job applicants the widest possible access to job vacancy information, there would be no need for any sort of tracking of an applicant's referral source, race, ethnicity or gender. All that would be required is for stations to identify the numerous ways they advertise their openings, how they develop awareness of broadcasting as a rewarding career among, for example, high school and college age students, etc. See, e.g., BEDA's "Model Broadcast Careers Program Road Map." If the Commission truly intends only to monitor national employment trends in the broadcast industry and report to Congress, all that it needs to do is require the filing of Annual Employment Reports under a tear-off sheet system so that once the filer has been logged in as having filed its report, the identity of the filer would be immediately disassociated from the data so that neither the Commission nor any member of the public could attribute the data to a particular station or stations. In any audit, including a random audit, the employment profile of the station would not be a subject for review. If an allegation of unlawful discrimination were made, the matter would be referred to

the EEOC for adjudication and any adverse results of which could be referred to the FCC for due consideration.

Under Adarand, the Court expects the Commission to sunset any race based regulations. Adarand at 2118. Not only has the Commission declined to do so, it has moved in the opposite direction making the New EEO Regulations even more permanent. See EEO R&O at para. 148. Given that the Lutheran Church court struck down (in effect "sunset") the Commission's former affirmative action regulations, at a minimum the Commission should be required to survey the effect, if any, of the absence of recruitment outreach regulations on its "diverse programming" goals before establishing new outreach regulations.

2. Deterring Discrimination Is Not A Legally Supportable Rationale for the New EEO Recruitment Outreach Requirements

The Commission urges, as a separate underpinning for its recruitment outreach regulations the need to deter racial and gender discrimination (EEO R&O at para. 3). To reflect this, the Commission has (i) expanded the concept of unlawful discrimination to include the failure to engage in adequate EEO recruitment outreach and (ii) invoked the basic qualifications standard under the Communications Act by equating every violation of the recruitment outreach regulations with "lack of character." However, there is a patent fallacy to the Commission's scheme.

First, the Commission's new recruitment outreach regulations are certainly not intended to remedy past unlawful discrimination (EEO R&O at para. 229). The Commission has never previously claimed, and does not and cannot now claim, that the broadcast industry has been guilty of unlawful discrimination.

Second, if the Commission's concern is with the potential for future unlawful discrimination by individual stations, the Commission has not provided a reasoned explanation how the new recruitment outreach regulations will, in fact, deter such future unlawful discrimination. For example, if the outreach requirements are successful in causing a station to recruit more minorities and women, that success does not in and of itself deter intentional unlawful discrimination in employment by that station; only the prohibition against unlawful discrimination does. In short, the Commission's deterrence rationale is a non-sequitur.

If, on the other hand, the Commission's concern is that in the absence of any broad and inclusive outreach regulations, stations will fail to adequately recruit minorities and women, the Commission has not shown that such regulations are necessary to assure nondiscriminatory treatment of minorities and women. Significantly, the court in Lutheran Church rejected the notion that the Commission's former affirmative action outreach program was needed to "seek nondiscriminatory treatment of women and minorities." Lutheran Church at 352. The court stated: "That argument . . . presupposes that non-discriminatory treatment typically will result in proportional representation in a station's workforce. The Commission provides no support for this dubious proposition and has in fact disavowed it, saying that 'we do not believe that fair employment practices will necessarily result in the employment of any minority group in direct proportion to its numbers in the community.'" (citation omitted) Lutheran Church at 352. Accordingly, there is simply no factual or legal basis for the Commission to equate recruitment outreach with unlawful discrimination.

3. The EEO R&O is Otherwise Arbitrary and Capricious

Commission action which is arbitrary and capricious is unlawful and cannot stand. See 5 U.S.C. § 706(2)(A) (1994). In adopting its New EEO Regulations, that are far more burdensome than any it has previously promulgated, the Commission has acted in an arbitrary and capricious manner. There is no explanation in the EEO R&O as to why the rationale and proposals set forth in Streamlining should not be adopted. Indeed, the EEO R&O does not even discuss the concept of "streamlining." There is no explanation as to why much more burdensome requirements are necessary. For example, under the former EEO rule, a licensee had to file one FCC Form 395-B annual employment report each year and an FCC Form 396 at license renewal time. Now, in addition to these forms, a licensee has to also file an election statement and an FCC Form 397 Statement of Compliance every two years, and place an EEO Public File Report in the public domain every year. There is no explanation as to why all of these additional reports are necessary.

The new outreach requirements are far more burdensome than before and require expensive programs by licensees. This is well-illustrated by the NAB's side by side comparison of the former and new EEO regulations, which is attached hereto as Exhibit 1. The extensive nature of the New EEO Regulations necessitates that licensees assign at least one person at each station, no matter how small, simply to maintain the paperwork and monitor EEO efforts. Although the Commission had sought comments in 1996 on reducing or eliminating EEO reporting requirements for stations with ten or less full-time employees, and many commentors supported this proposal, the EEO R&O provides no relief to these small broadcasters. Although the Commission had not previously required the filing of EEO recruitment information

concerning minorities in markets where the minority labor force was less than five percent, the Commission has now adopted this practice. Thus, without any reasoned analysis, the Commission has expanded the reach of its complicated and expensive new requirements.

The history of the FCC's revision of its EEO regulations well illustrates the arbitrary and capricious nature of the EEO R&O. In 1994, the Commission commenced a Notice of Inquiry, EEO Notice of Inquiry, 9 FCC Rcd 2047 (1994) [hereinafter "EEO NOI"] which asked whether there was a way to decrease the administrative burdens that the then-existing EEO rule placed on broadcasters while maintaining the effectiveness of EEO enforcement. EEO NOI at 2051. In response, a number of broadcasters commented that the existing requirements, in terms of money spent recruiting and recordkeeping, were burdensome and should be reduced. EEO NOI at 6307.

The next step in the Commission's efforts to revise its EEO regulations occurred in 1996 with the issuance of Streamlining. In Streamlining, the Commission stated: "We emphasize that compliance with our EEO Rule and policies must be observed by all licensees. We are concerned, however, that our EEO requirements may unnecessarily burden broadcasters, particularly licensees of smaller stations and other distinctly situated broadcasters, and therefore propose changes to our Rule and policies to provide relief to such broadcasters." Streamlining at 5155. In recognition of the comments that had been filed by broadcasters and the State Associations in response to the EEO NOI, the Commission set forth proposals in its 1996 Streamlining NPRM "for reducing the filing and record keeping requirements of stations." Streamlining at 5164. In Streamlining, the Commission said:

> We believe that it would be counterproductive to impose new reporting burdens as a means of alleviating EEO burdens.

> The Commission seeks to reduce the burdens of all broadcasters, not just broadcasters of small stations and other distinctly situated broadcasters, to the extent possible without decreasing the effectiveness of our EEO program.

Streamlining at 5168. The Commission reiterated this purpose in its Order and Policy Statement, 13 FCC Rcd 6322 (1998).

Between 1996 and the release of the EEO R&O, the District of Columbia Circuit decided Lutheran Church which in effect required the Commission to re-examine whether it had authority to promulgate any EEO regulations. The court certainly did not require the Commission to add more burdensome requirements. In fact, the court had expressed concern that the existing regulations already caused "economic harm by increasing the expense of maintaining a license." Lutheran Church at 349-350. Yet the Commission's response has been to pile on far more burdensome requirements than existed previously.

The New EEO Regulations are arbitrary and capricious in other respects. To mention only a few examples, given the expressed limited need for the Annual Employment Reports, it was arbitrary and capricious for the Commission not to adopt a tear-off sheet system. See pp. 15 and 24, supra. The Commission has failed to provide its regulatees with sufficient information for them to determine when their outreach efforts are legally adequate under either Option A or B. See p. 20, supra. The Commission has not even completed the rule making since it has failed to inform its regulatees what the base fine for a violation of the New EEO Regulations will be or what factors the Commission will consider relevant and material in determining whether there should be an adjustment in that base amount. See p. 20, supra. Moreover, the Commission is requiring stations to place the EEO Public File Reports on their websites, in addition to placing

them in their public files. See EEO R&O at para. 124. This requirement is an arbitrary and capricious burden on broadcasters because the purpose of the public file is to enable listeners and viewers within the station's local service area to obtain certain information. This goal is already fulfilled by requiring broadcasters to maintain public inspection files at their respective stations. The Commission rejected a similar website idea not too long ago. See Review of Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, Report and Order, FCC 98-175, 13 FCC Rcd 15691 (released August 11, 1998).

C. NO IRREPARABLE INJURY WILL BE CAUSED TO OTHERS IF A STAY IS GRANTED

No one will be irreparably harmed by a stay of the New EEO Regulations during judicial review. The nondiscrimination prong of the Commission's current EEO regulations remains in full force and effect undisturbed by any stay. Accordingly, unlawful employment discrimination will continue to be prohibited, and the government retains the necessary and appropriate regulatory tools to enforce that prohibition. With respect to the recruitment outreach prong, the Commission did not conduct a survey of, find or even claim that the level of outreach effort that currently exists within the industry is inadequate to achieve "diverse programming." Furthermore, the Commission deliberated for fifteen months after the Court's decision denying rehearing en banc before adopting the New EEO Regulations. A respectful decision by the Commission to await the court's review under an expedited briefing schedule, particularly in view of the deficiencies in the EEO R&O, will create an important time interval for such review that is minor compared with the time period that has already elapsed.

D. THE PUBLIC INTEREST FAVORS A STAY

The public interest is disserved anytime the Federal Government takes action which violates the United States Constitution. That situation exists here. It will clearly serve the public interest for the government to take steps that will protect the Constitution and the rights of its citizens thereunder during judicial review of this matter. The ban against unlawful discrimination by broadcasters is not placed in jeopardy during the court's review. There are ample federal, state and local laws prohibiting unlawful discrimination that remain in force.

The public interest will be served by a grant of stay pending the appeal. The State Associations have already appealed to the very court which had constitutional concerns with the Commission's former EEO regulations. The New EEO Regulations are expressly intended to address those concerns (EEO R&O at paras. 5 and 229). A stay pending appeal will allow the court an appropriate opportunity to assess whether the Commission has adequately addressed those concerns without the Commission placing the broadcast industry and the people they recruit at risk of having their constitutional rights violated during the interim.

Lastly, a stay at least while the Commission considers the NAB's Reconsideration Petition (and any others that may be filed) will eliminate the likelihood of serious confusion within the broadcast industry and the nation, and thus would serve the public interest. For example, before the Commission for approval are several large broadcast merger transactions. If the parties are required to amend pending applications, depending on what action the Commission takes on reconsideration the parties may have to amend a second time. In any event, the Commission is required by law to carefully consider the issues raised by the NAB in its Reconsideration Petition. The speed with which the Commission acts on that petition, and the

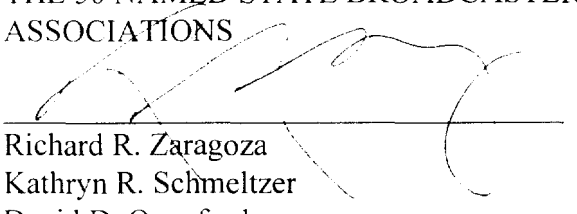
outcome of such action, are unknown and under the Commission's sole control. It would be fundamentally unfair and confusing to the broadcast industry, as well as to the intended beneficiaries of the New EEO Regulations, to begin this extensive and burdensome new program when the Commission may be persuaded, or compelled, to revise its new EEO program in numerous, material ways, or even to withdraw it.

III. CONCLUSION

A stay is appropriate where, as here, "a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the [stay] would inflict irreparable injury on the movant." WMATA at 844. For all the reasons shown above, the Commission should grant the requested stay.

Respectfully submitted,

THE 50 NAMED STATE BROADCASTERS ASSOCIATIONS



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